11-19-2009

Tiegs v. Robertson Appellant's Brief Dckt. 35921

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRUCE TIEGS, individually and as co-personal, representative of the Estate of Kenneth Tiegs; STEVEN TIEGS; and SUSAN HUNTER, individually and as co-personal representative of the Estate of Kenneth Tiegs, and K.P. INC., an Idaho Corporation, Plaintiffs-Respondents, v. DUSTIN M. KUKLA, Defendant. And DARRELL L. ROBERTSON, Defendant-Appellant.	Supreme Court Docket No.: 35921
KENNETH TIEGS AND SONS, INC., as subrogee of UNIGARD INSURANCE, Plaintiff-Respondent, DUSTIN M. KUKLA, Defendant, And DARRELL L. ROBERTSON, Defendant-Appellant.	

APPELLANT'S BRIEF

Appeal from the District Court of the Third Judicial District in and for the County of Canyon

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A) NATURE OF THE CASE

This litigation arises out of Plaintiffs' attempts to punish a man for doing a charitable act for his neighbor. Defendant Dustin M. Kukla had been hired to bale straw for a neighboring farming family, the Scholls. Mr. Kukla was planning to borrow his grandfather's baler, but was ultimately unable to borrow that baler. In July of 2003, Mr. Kukla approached Defendant Darrell L. Robertson who had a tractor and baler. Mr. Robertson told Mr. Kukla he could borrow the tractor and baler without any payment. Mr. Robertson had Mr. Kukla use the tractor and baler on Mr. Robertson's own field ensuring that Mr. Kukla could operate the equipment properly.

During the daytime, Mr. Kukla took the tractor and baler off of Mr. Robertson's property. Mr. Robertson followed using his pickup as a pilot vehicle. On July 30, 2003, Mr. Kukla drove the tractor and baler on a roadway at night in order to take the tractor and baler to his truck to obtain items necessary to repair the baler.

Mr. Kenneth Tiegs was driving his vehicle on that same roadway. Mr. Tiegs's vehicle impacted the rear of the baler. Mr. Tiegs did not survive the impact. Plaintiffs are the family of Mr. Tiegs and the corporation owning the vehicle Mr. Tiegs was operating.

The appeal involves the legal questions raised by Mr. Robertson's motions for summary judgment on the claims of negligent entrustment, negligence per se and imputed liability and the district court's decision thereon. This appeal also is directed at the district court's decision to grant Plaintiffs a new trial.

B) COURSE OF PROCEEDINGS

Plaintiffs filed their Complaint on April 26, 2004. R, p. 11. Defendant Robertson was served on May 8, 2004. In their initial Complaint, Plaintiffs named only two Defendants: 1)

Defendant Kukla, as the operator of the tractor and baler at the time of the accident, and 2) Darrell Robertson, as the owner of the tractor and baler. *Id.* In this initial Complaint, Plaintiffs alleged the following four causes of action against Defendants: (1) Negligence; (2) Negligent Entrustment; (3) Negligence Per Se; and (4) Imputed Liability pursuant to Idaho Code § 49-2417(1). R, pp. 11-22. Plaintiffs' Negligence claim mentioned only "Defendants" and contained no factual allegations against Defendant Robertson. R, pp. 14-15. The three remaining claims, Negligent Entrustment, Negligence Per Se and Imputed Liability specifically make reference to the conduct of Defendant Robertson and are the subject of this motion. R, pp. 15-20.

Defendant Robertson's Answer and Demand for Jury Trial denying liability was filed on May 28, 2004. R, p. 23.

Defendant Kukla failed to respond to the initial Complaint filed by Plaintiffs and a Default Judgment was entered against him by this Court on June 28, 2004. R, p. 32.

Plaintiff's First Amended Complaint and Demand for Jury Trial ("First Amended Complaint") was filed on or about September 21, 2005. R, p. 35.

Plaintiff's First Amended Complaint added Defendant Mike Kukla as a party and added a fifth cause of action for Respondeat Superior Liability against Defendant Mike Kukla. R, pp. 35 and 44. The substance of the allegations against Defendant Robertson remained unchanged. R, pp. 35-44.

Defendant Robertson's Answer to Plaintiff's First Amended Complaint and Demand for Jury Trial was filed on September 29, 2005. R, p. 48.

Defendant Michael Kukla's Motion for Summary Judgment was field on November 3, 2005. R, p. 62.

Defendant Robertson's Motion for Summary Judgment was filed on February 8, 2006. R, p. 230. Defendant Robertson also filed a memorandum in support of the motion for summary judgment along with the Affidavits of Darrell L. Robertson and Michael A. Pope on February 8, 2006. R, p. 482, Exhibit "Defendant Robertson's Memorandum of Law in Support of Motion for Summary Judgment – February 8, 2006"; R, p. 233 and R, p. 237.

Plaintiffs filed their Memorandum in Opposition to Defendant Darrell Robertson's Motion for Summary Judgment on February 23, 2006.

Defendant Robertson then filed Defendant Robertson's Reply Memorandum of Law in Support of Motion for Summary Judgment on March 1, 2006. R, p. 482, Exhibit "Defendant Robertson's Reply Memorandum of Law in Support of Motion for Summary Judgment – March 1, 2006."

Judge Renae J. Hoff heard oral arguments on Defendant Robertson's motion for summary judgment on March 8, 2006. Tr. "Summary Judgment Hearing – March 8, 2006", p. 4. Judge Hoff denied the motion for summary judgment. *Id.* at pp. 23-28.

Following Judge Hoff's ruling, Judge Gordon W. Petrie was assigned the file for purposes of trial.

The initial trial was begun on September 21, 2007. R, p. 464. The initial trial ended in a mistrial on September 25, 2007. *Id.*

Following the mistrial, Defendant Robertson filed Defendant Robertson's Memorandum of Law in Support of Motion for Summary Judgment on Plaintiffs' Allegations of Negligent Entrustment, Negligence *Per Se* and Imputed Liability on December 7, 2007. *Id.*

Plaintiffs filed the Memorandum in Opposition to Defendant Darrell Robertson's Motion for Summary Judgment on December 20, 2007. R, p. 399.

Defendant Robertson's Reply Memorandum in Support of Motion for Summary Judgment on Plaintiffs' Allegations of Negligent Entrustment, Negligence *Per Se* and Imputed Liability was filed on December 27, 2007. R, p. 464.

Judge Petrie heard oral arguments on the motion on January 3, 2008. Tr., "Motion for Summary Judgment – January 3, 2008", p. 1. Judge Petrie took the matter under advisement and subsequently issued the Memorandum Decision on Defendant Robertson's Motion for Summary Judgment on February 7, 2008. R, p. 418.

Trial took place from July 14, 2008 to July 19, 2008. The jury returned the following responses to the special interrogatories:

> WE, THE JURY, answer the special interrogatories as follows:
>
> Questions 1: Was Defendant Darrell L. Robertson negligent in loaning the tractor and hay baler to Defendant Dustin M. Kukla?
>
> YES__X__ NO ____
>
> ...
>
> Question 2: Was the negligence of Defendant Darrell L. Robertson a proximate cause of the death of the Decedent and any injuries to the Plaintiff?
>
> YES____ NO __X__
>
> ...
>
> Question 3: Was the negligence of Defendant Dustin M. Kukla a proximate cause of the death of the Decedent and any injuries to the Plaintiff?
>
> YES__X__ NO ____
>
> ...
>
> Question 4: Did Defendant Darrell Robertson negligently entrust Defendant Dustin Kukla with a tractor and hay baler?
>
> YES____ NO __X__
>
> ...
>
> Question 6: Did Defendant Dustin Kukla operate the tractor and baler on the highway and at the time of the occurrence with the express implied permission of Defendant Darrell Robertson?
>
> YES____ NO __X__
>
> ...
>
> Question 8: Was the Decedent, Kenneth Tiegs, negligent in the operation of his vehicle at the time and place of the occurrence in question?
>
> YES__X__ NO ____
>
> ...

Question 9: Was the Decedent, Kenneth Tiegs', negligent [sic] in the operation of his vehicle at the time and place of the occurrence in question a proximate cause of his death?

YES_____ NO __X__

...

If nine or more of you answered "Yes" to any of the questions 2, 3, 5, or 7, proceed to Question 10. If, however, you answered "No" to each of these questions you are done.

Special Verdict Form, pp. 1-9

Question 10: In this question, you apportion fault between the parties in terms of percentage. As to each party, determine the percentage of fault for that party and enter the percentage on the appropriate line. If you answered "No" to Question 8, you must enter "0" (zero) as to Decedent Kenneth Tiegs. However, whatever percentages you enter with regard to each of the parties, the sum of the percentages must equal 100% (one hundred percent). Therefore, what is the percentage of fault as to each of the following:

As to Defendant Darrell Robertson?	15%
As to Defendant Dustin Kukla?	80%
As to Decedent Kenneth Tiegs?	5%

Id. at 10.

Total must equal 100%

Id. at 11.

Question 11: We assess the Plaintiffs' damages in the following amount:

As to Plaintiff Bruce Tiegs:	$ 2,500 00/100
As to Plaintiff Steven Tiegs:	$ 2,500 00/100
As to Plaintiff Susan Huter:	$ 2,500 00/100

Id. at 12.

Following the trial, Plaintiffs filed Plaintiffs' Motion for New Trial on August 21, 2008.

Defendant Robertson filed a Memorandum in Opposition to Plaintiffs' Motion for New Trial on September 4, 2008. Plaintiffs' filed a Reply Memorandum in Support of Plaintiffs' Motion for New Trial on September 11, 2008.

Judge Petrie heard oral arguments on the issue on September 15, 2008. Tr., "Plaintiff's Motion for New Trial – September 15, 2008", p. 19. On October 20, 2008, Judge Petrie issued the Order on Motion for New Trial. R, p. 453.

The Notice of Appeal was filed by Defendant Robertson on November 28, 2009. R, p. 457.

C) STATEMENT OF THE FACTS

In late July 2003, Appellate Robertson was contacted by Mr. Kukla in regards to borrowing a tractor and baler owned by Appellate Robertson so that Mr. Kukla could bale straw purchased from the Schroll family. R, p. 252, Deposition of Darrell L. Robertson, p. 39, ll. 7-17. Appellate Robertson was advised by Mr. Kukla that he had originally intended to use his grandfather's baler to complete the baling of the field owned by the Schroll family. *Id.* at ll. 14-17. According to Mr. Kukla, he offered to pay Appellate Robertson for the use of the tractor and baler. R, p. 304, Deposition of Darrell L. Robertson, p. 107, l. 8-p. 111, l. 10. This offer was denied by Appellate Robertson and he loaned the tractor and baler to Mr. Kukla in order to help him out and was not expecting to be compensated for the use of this equipment. *See* R, p. 234, Affidavit of Darrel Robertson, ¶ 2.

The tractor and baler were picked up by Mr. Kukla during the daytime at a property owned by Appellate Robertson. R, p. 258, Deposition of Darrell L. Robertson, p. 61, l. 21-p. 63, l. 18; R, p. 304, Deposition of Dustin M. Kukla, p.105, l. 12-p. 107, l. 21. At the time of the entrustment, Appellate Robertson was advised by Mr. Kukla that the tractor and baler would be used for the purpose of baling straw on private property owned by the Schroll family. R, p. 253, Deposition of Darrell L. Robertson, p. 41, l. 4-p. 47, l. 17. Prior to allowing Mr. Kukla to borrow the tractor and baler, Appellate Robertson made sure that Mr. Kukla knew how to

properly operate the tractor and baler for this intended purpose by having him complete a portion of the field that Appellate Robertson had been baling. *Id.*; R, p. 234, Affidavit of Darrel Robertson, ¶ 4.

On July 30, 2003, Mr. Kukla was baling straw on the Schroll property just off of Missouri Avenue in Nampa, Idaho. R, p. 308, Deposition of Dustin M. Kukla, p. 123, ll. 7-19. At approximately 10:30 p.m., Mr. Kukla drove the tractor and baler onto Missouri Avenue for a short distance and then turned right onto Highway 45 to take the tractor and baler to his vehicle for repairs. *Id.* p.129, l. 4-p.134, l. 22. After traveling approximately 150-200 yards down Highway 45, the baler was struck from behind by the Mercury Sable driven by Mr. Kenneth Tiegs. R, p. 311, Deposition of Dustin M. Kukla, p. 135, l. 23- p. 136, l. 3. As a result of the collision, between the tractor and baler being operated by Mr. Kukla and Mr. Tiegs' Mercury Sable, Mr. Tiegs was killed.

II. ISSUES PRESENTED ON APPEAL

A) Whether Appellate Robertson's Motion for Summary Judgment Should Have Been Granted by the District Court?

1. Whether I.C. § 49-2417(1) Imputes Liability upon the Owner of an Implement of Husbandry Which Implement has Been Borrowed by a Person That Negligently Uses the Implement Causing Injury to a Third-Party?
2. Whether Appellate Robertson Knowingly Permitted Mr. Kukla to Operate the subject Vehicle at Nighttime in Violation of I.C. §§ 49-902, 903 and 916?
3. Whether Respondent Failed to Provide Sufficient Evidence to Establish the Elements of Negligent Entrustment?

B) Whether the Jury's Verdict that Appellate Robertson's Actions were not a Proximate Cause of the Respondent's Injuries Should be Upheld?

III. ARGUMENT

This brief establishes that (A) the District Court should have granted Appellant's motion for summary judgment and (B) the District Court should have denied Respondent's motion for new trial following the trial.

A) The District Court Should Have Granted Appellate Robertson's Motion for Summary Judgment

1. Standard of Review

I.R.C.P. 56 sets forth the criteria for granting summary judgment. The rule states that, if the pleadings, discovery, and affidavits show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law, the judgment sought shall be rendered forthwith. I.R.C.P. 56(c).

The moving party has the burden of proving the absence of genuine issues of material fact. *See Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416 (1996). Once this burden has been met, the non-moving party may not rest upon the mere allegations or denials contained in the pleadings, but must come forward and produce evidence by affidavits or as otherwise provided in the rules to set forth specific facts showing that there is a genuine issue for trial. I.R.C.P. 56(e). The facts are to be liberally construed in favor of the party opposing the motion, who is also to be given the benefit of all favorable inferences that might be reasonably drawn from the evidence. *Anderson v. Ethington*, 103 Idaho 658, 651 P.2d 923 (1982). Although inferences may be drawn in favor of the non-moving party, a mere scintilla of evidence is not enough to create a genuine issue of fact. Rather, there must be evidence upon which a jury

can rely. *Taylor v. Choules*, 102 Idaho 220, 626 P.2d 1056 (1981); *Straley v. Idaho Nuclear Corp.*, 94 Idaho 917, 500 P.2d 218 (1972). "Judgment shall be granted to the moving party if the nonmoving party fails to make a showing sufficient to establish an essential element to the party's case." *McColm-Traska v. Baker*, 139 Idaho 948, 950-51, 88 P.3d 767, 769-70 (2004).

The purpose of I.R.C.P. 56 is to eliminate the time and cost involved in bringing an action to trial when the end result would be a directed verdict:

> The purpose of the rule is to allow the court to pierce the pleadings in order to eliminate groundless denials and paper issues in cases which would end in directed verdicts or other rules of law.
>
> . . . the rule itself, in permitting summary judgment where "no genuine issue of any material fact" appears, plainly requires more to forestall summary judgment than the raising of the "slightest doubt" as to the facts.

LePelley v. Grefenson, 101 Idaho 422, 428, 614 P.2d 962, 968 (1980) (citing *Tri State National Bank v. Western Gateway Storage Co.*, 92 Idaho 543, 545, 447 P.2d 411, 412 (1968)).

The moving party is entitled to judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial. *Thompson v. City of Lewiston*, 137 Idaho 473, 475-76, 50 P.3d 488, 490-91 (2002).

2. I.C. § 49-2417 (1) Does Not Impute Liability upon the Owner of an Implement of Husbandry Which Implement has Been Borrowed by a Person That Negligently Uses the Implement Causing Injury to a Third-Party.

This inquiry involves the interpretation of specific provisions of the Idaho Code. The construction of a legislative act presents a pure question of law for this Court to decide. *Crawford v. Dept. of Corrections*, 133 Idaho 633, 635, 991 P.2d 358, 360 (1999). Courts also exercise free

review over the interpretation of statutes. *Adamson v. Blanchard*, 133 Idaho 602, 605, 990 P.2d 1213, 1216, (1999).

"Courts are empowered to resolve ambiguities in statutes by ascertaining and giving effect to legislative intent." *Easley v. Lee*, 111 Idaho 115, 118, 721 P.2d 215, 218 (1986) citing: *Nampa Lodge No. 1389 v. Smylie*, 71 Idaho 212, 229 P.2d 991 (1951). "The act should be construed in its entirety and as a whole for the purpose of ascertaining the legislative intent, and where different sections reflect light upon each other they are regarded as *in pari materia*." *Id.*

The Idaho Supreme Court has also held, "'all parts of a statute should be given meaning,' and the Court 'will construe a statute so that effect is given to its provisions, and no part is rendered superfluous or insignificant.'" *Moreland v. Adams*, 143 Idaho 687, 690, 152 P.3d 558, 561 (2007) citing: *Idaho Cardiology Associates, P.A. v. Idaho Physicians Network, Inc.*, 141 Idaho 223, 226, 108 P.3d 370, 373 (2005).

The relevant statutes in this matter are all found in the *Idaho Motor Vehicles Act* (the "Act").

Idaho Code § 49-2417(1) provides:

> Every owner of a *motor vehicle* is liable and responsible for the death of or injury to a person or property resulting from negligence in the operation of his *motor vehicle*, in the business of the owner or otherwise, by any person using or operating the vehicle with the permission, express implied, of the owner, and the negligence of the person shall be imputed to the owner for all purposes of civil damages. (Emphasis added).

Idaho Code § 49-2417(1) by its plain language applies only to "motor vehicles" as defined in this statute and not to the tractor and baler that are at issue in this lawsuit. A motor vehicle is defined under I.C. § 49-123(g) as:

> Every vehicle which is self propelled and every vehicle which is propelled by electric power obtained by overhead trolley wires but not operated upon rails,

except vehicles moved solely by human power, electric personal assistive mobility devices and motorized wheelchairs. 49-123(g)

Pursuant to Idaho Code § 49-110(2), the applicable definitions section of the Act, a farm tractor when drawing an implement of husbandry such as a baler is to be defined as an implement of husbandry for purposes of the Act:

> "Implements of husbandry" means every vehicle including self-propelled units, designed or adapted and used exclusively in agricultural, horticultural, dairy and livestock growing and feeding operations when being incidentally operated. Such implements include, but are not limited to, combines, discs, dry and liquid fertilizer spreaders, cargo tanks, harrows, hay balers, harvesting and stacking equipment, pesticide applicators, plows, swathers, mint tubs and mint wagons, and farm wagons. A farm tractor when attached to or drawing any implement of husbandry shall be construed to be an implement of husbandry. "Implements of husbandry" do not include semitrailers, nor do they include *motor vehicles* or trailers, unless their design limits their use to agricultural, horticultural, dairy or livestock growing and feeding operations. (Emphasis added).

This provision specifically states that implements of husbandry do not include motor vehicles. Because the tractor and baler are defined as an implement of husbandry and not as a motor vehicle for purposes of the Act, the legislature has through its definitions exempted implements of husbandry from the imputed liability provision of Idaho Code § 49-2417(1). Where, as here, Idaho Code § 49-2417(1) specifically applies only to motor vehicles, implements of husbandry are excluded from imputed liability pursuant to this provision of the Act. Under the rule of statutory interpretation *expressio unius est exclusio alterius*, as well as the plain language of the statutes themselves, Idaho Code § 49-2417(1) is inapplicable to the case at bar. *See Poison Creek Publishing, Inc., v. Central Idaho Publishing, Inc.*, 134 Idaho 426, 3 P.3d 1254 (Ct. App. 2000).

The District Court in addressing these statutes went too far in attempting to peer into why the Idaho Legislature chose to exempt implements of husbandry and ended by making a decision contrary to the plain meaning of the statute. R, pp. 444-451. Essentially, the District Court

inserted its own legislative intent into to the Act and created new law. The District Court essentially holds that, "if the legislature wanted to exclude 'implements of husbandry,' from Idaho's imputed negligence statute, it would have done so." R, p. 451. The District Court failed to recognize that silence or ambiguity in a statute can be interpreted two ways. Where it is true that the Idaho Legislature could have specifically excluded implements of husbandry, it could have as easily specifically included implements of husbandry. Thus the Idaho Legislature's silence does not show intent to include implements of husbandry under I.C. § 49-2417.

By defining implements of husbandry in I.C. § 49-110(2), the Idaho Legislature shows its intent to not treat implements of husbandry as motor vehicles. Even the District Court essentially admitted that many, if not most implements of husbandry would be excluded from I.C. § 49-2417. The District Court stated that, "To be sure, hay balers do not constitute motor vehicles." *Id.* Here the District Court holds that despite the Idaho Legislature not specifically excluding implements of husbandry from I.C. § 49-2417, it does exclude hay balers and any other implements of husbandry not self-propelled.

Two hypothetical scenarios will further illustrate the inconsistency of the District Court's opinion with the Legislature's intent as expressed in I.C. § 49-110(2). In the first case, a farmer knowingly lends a hay baler to a neighbor with a defective hitch and a tractor with non-functioning lighting equipment. The neighbor begins transporting the hay baler by tractor along a roadway at night. The hitch slips and the hay baler is left sitting on the roadway unattached to the tractor with no lighting. A car impacts the hay baler. Under the District Court's interpretation of I.C. § 49-2417, there is no imputed liability because the hay baler is an implement of husbandry not hooked up to a tractor.

The second case is the same as the first except the car swerves and misses the hay baler but further down the roadway runs into the tractor. In this circumstance, the tractor by itself qualifies as a motor vehicle and would fall under the strictures of I.C. § 49-2417.

The above examples demonstrate that the District Court's decision rests solely upon its determination that when you add a tractor to an implement of husbandry, then it becomes a motor vehicle for purposes of I.C. § 49-2417. This reasoning is directly contrary to the Idaho Legislature's decision to specifically change the status of a tractor to an implement of husbandry when it is connected to an implement of husbandry. I.C. § 49-110(2) states: "A farm tractor when attached to or drawing any implement of husbandry shall be construed to be an implement of husbandry." The Idaho Legislature by making this specific designation recognizes that by itself a tractor would fall under the general definition of a motor vehicle, and therefore, the Legislature took the effort to statutorily change a tractor's status when attached to an implement of husbandry.

The Idaho Legislature's intent is that tractors while attached to implements of husbandry should be treated as implements of husbandry, and not that implements of husbandry be treated as motor vehicles when attached to a tractor. The Legislature's intent then is that a hay baler should not be treated differently under the Act simply because it is attached to a tractor. Interpreting I.C. § 49-2417 to apply to this hay baler would be going against the plain intent of the Legislature.

Based upon the plain intent of the Idaho Legislature, Appellant's request that this Court reverse the District Court's decision and rule that I.C. § 49-2417 does not apply to hay balers even when they are attached to tractors.

3. Appellant did not Cause or Knowingly Permit the Operation of the Subject Vehicle at Nighttime in Violation of I.C. §§ 49-902, 903 and 916.

This inquiry also involves the interpretation of Idaho statutes and the previously provided case citations regarding statutory interpretation apply in this instance and throughout our brief.

Respondents' First Amended Complaint alleges negligence *per se* against Appellant. Respondents' allegation of negligence *per se* in this case is predicated on the improper interpretation of I.C. § 49-916. In support of their claim for negligence *per se* against Appellant, Respondents alleged that "[b]y allowing Mr. Dustin Kukla to operate the tractor and baler on a public road after sunset without visible tail lights or reflectors, Appellate Robertson was in direct violation of the provisions of Idaho Code § 49-916." R, p. 42, Plaintiff's First Amended Complaint, ¶ 37.

The relevant provisions relating to this question are Idaho Code §§ 49-902(1) and (3); 49-903; 49-916(3) and (4). Idaho Code § 49-902(1) and (3) state (Emphasis added):

> (1) It shall be unlawful for any person to drive, or move, or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or combination of vehicles which is in an unsafe condition as to endanger any person, or which does not contain those parts or is not at all times equipped with the lamps and other requirements in proper condition and adjustment, as required by the provisions of this chapter, or which is equipped in any manner in violation of the provisions of this chapter.
>
> ...
>
> (3) The provisions of this chapter, with respect to equipment on vehicles, *shall not apply* to implements of husbandry, road machinery, road rollers, farm tractors or slow moving vehicles except as otherwise specifically made applicable.

Idaho Code § 49-903 states:

> Every vehicle upon a highway at any time from sunset to sunrise and at any other time when there is not sufficient light to render clearly discernible persons and vehicles on the highway at a distance of five hundred (500) feet ahead shall display lighted lamps and illuminating devices as here respectively required for different

classes of vehicles, subject to exceptions with respect to parked vehicles as stated herein.

Idaho Code § 49-916(3) and (4) state:

> (3) Every farm tractor and every self-propelled unit of farm equipment or implement of husbandry equipped with an electric lighting system shall at all times specified in section 49-903, Idaho Code, be equipped with two (2) single-beam or multiple-beam head lamps meeting the requirements of sections 49-922 or 49-924, Idaho Code, respectively or, as an alternative, section 49-926, Idaho Code, and two (2) red lamps visible from a distance of not less than five hundred (500) feet to the rear, or in the alternative, one (1) red lamp visible from a distance of not less than five hundred (500) feet to the rear and two (2) red reflectors visible from a distance of one hundred (100) to six hundred (600) feet to the rear when illuminated by the upper beams of head lamps. Red lamps or reflectors shall be mounted in the rear of the farm tractor or self-propelled implement of husbandry to indicate as nearly as practicable the extreme left and right projections of the vehicle on the highway.
>
> (4) The farm tractor element of every combination of farm tractor and towed farm equipment or towed implement of husbandry equipped with an electric lighting system shall at all times specified in section 49-903, Idaho Code, be equipped with two (2) single-beam or multiple-beam head lamps meeting the requirements of sections 49-922, 49-924, or 49-926, Idaho Code.

These provisions of the Idaho Code prohibit the operation of an implement of husbandry on a public roadway between "sunset" and "sunrise" and "at any other time when there is not sufficient light" without the equipment required by I.C. § 49-916. This standard applies to any person operating the relevant machinery.

The statutory duty of an owner of an implement of husbandry is further limited by I.C. § 49-902(1) at times when they are not the operator of the vehicle, by requiring that there be a showing the owner "cause[d] or knowingly permit[ted] to be driven" a vehicle that is in violation of the specific requirements of the chapter. I.C. § 49-902(1)

The question of whether a statute imposes a duty upon a particular person or entity is a question of law which the Court freely reviews. *Mugavero v. A-1 Auto Sales, Inc.*, 130 Idaho 554, 557, 954 P.2d 141, 154 (Ct. App. 1997). Therefore, in reviewing Respondent's negligence

per se claim, this Court may make its own determination for purposes of appeal whether the statute cited by Respondents establishes a duty on behalf of Appellant as a matter of law.

Once the extent of the duty is established, negligence *per se* does not differ in its legal consequences from ordinary negligence. *Vaughn v. Porter*, 140 Idaho 470, 95 P.3d 88, (Ct. App. 2004) (citing, *Ahles v. Tabor*, 136 Idaho 393, 395, 34 P.3d 1076, 1078 (2001)). As the Supreme Court noted in *Ahles:*

> The effect of establishing negligence *per se* through violation of a statute is to conclusively prove the first two elements of a cause of action in negligence. *Slade v. Smith's Management Corp.*, 119 Idaho 482, 489, 808 P.2d 401, 408 (1991). Negligence *per se* lessens the plaintiff's burden only on the issue of the "actor's departure from the standard of conduct required of a reasonable man." RESTATEMENT (SECOND) OF TORTS § 288B cmt. B (1965). Thus, the elements of duty and breach are "taken away from the jury." *See* Prosser and Keeton on Torts 230 (5th ed.1984).

As stated, the Idaho Legislature created a separate duty under I.C. § 49-902(1) for owners when they are not the operator of their vehicle. The Idaho Legislature has also created a separate standard for implements of husbandry than for other vehicles. In order to establish their claim for negligence *per se*, Respondents must establish that Appellant either caused Mr. Kukla or knowingly permitted Mr. Kukla to drive or move the tractor and baler on Highway 45 after sunset.

The District Court began by setting forth the appropriate statutes in its decision, but it then misapplied the holding of *State v. Evans*, 134 Idaho 560, 6 P.3d 416 (Ct.App. 2000) in finding that an owner of an implement of husbandry cannot cause or knowingly permit their implement of husbandry to be operated on a roadway *at any time* unless they have the equipment required by I.C. § 49-916. R, p. 441.

The *Evans* case is not directly applicable in this matter because it did not involve an implement of husbandry which is treated differently than a normal vehicle under I.C. § 49-902.

In *Evans* an individual was pulled over for driving a car with only one operational headlight in violation of I.C. §§ 49-902 and 905. *Evans*, 134 Idaho at 562, 6 P.3d at 418. The driver was ultimately found to be intoxicated and was arrested for DUI. *Id.* Counsel for the driver argued that the police officer did not have reasonable suspicion of wrongdoing, because the vehicle was being operated prior to sunset. *Id.* Counsel for driver asserted that the requirements of I.C. § 49-902(1) and I.C. § 49-905 are limited to those times specified in I.C. § 49-903. *Id.* at 563-564, 6 P.3d at 419-420.

The Court of Appeals disagreed and held:

> By its plain language, this section [I.C. § 49-903] only states when headlights must be turned on. This statute does not authorize the operation of vehicles with inoperable headlights on Idaho highways. For numerous reasons, operable headlights may be unexpectedly required long before sunset: sudden changes of weather; agricultural dust; smoke from burning fields or forest fires to name a few. We therefore conclude that Evans' reading of I.C. § 49-903 as permitting the operation of vehicles with inoperable headlights before sunset inconsistent with Idaho's policy of providing a safe highway system.

Id. at 564, 6 P.3d at 420.

The District Court applied this language in its holding to Appellant's implement of husbandry. This determination overlooked the fact that the interpretation of the language in I.C. §§ 49-902(1) and 49-905 that were at issue in *Evans* is not applicable to implements of husbandry, which require a review of I.C. §§ 49-902(3) and 49-916. The difference in the language between these two sets of provisions is crucial in analyzing the duty of Appellant in this case.

Idaho Code § 49-902(1) must be filtered through I.C. § 49-902(3) which states plainly that, "The provisions of this chapter (including I.C. § 49-902(1)), with respect to equipment on vehicles, *shall not apply* to implements of husbandry ... except as otherwise specifically made applicable." I.C. § 49-902(3) (Emphasis added). The Idaho Legislature essentially stated that

I.C. § 49-902(1) has no applicability to implements of husbandry unless some provision specifically makes it applicable. The Legislature's plain intent is to treat implements of husbandry different from other motor vehicles.

The equipment rules for implements of husbandry are then specifically set forth in I.C. § 49-916. Unlike I.C. § 49-905 that was interpreted in *Evans*, I.C. § 49-916 contains the following language preceding the equipment requirements in each of its major subparagraphs, "shall at all times specified in section 49-903". Idaho Code § 49-916 limits the equipment requirements to the times set forth in I.C. § 49-903, not the times set forth in I.C. § 49-902(1). The inclusion of the specific reference to I.C. § 49-903 in I.C. § 49-916 is especially revealing considering the omission of any reference to I.C. § 49-903 in I.C. §§ 49-905, 906, 907, 909 and 915.

The differing treatment of implements of husbandry is appropriate considering the fact that many implements of husbandry only rarely travel on roadways and do not often come with built in lighting equipment. Often the dictates of I.C. § 49-916 are met in regards to implements of husbandry by using removable lamps and reflectors. Removable lighting equipment prevents damage to the lighting equipment while the implement of husbandry is in use in the fields. It is very logical therefore to only require lighting equipment during the time periods set forth in I.C. § 49-903.

The Legislature's intent is further illuminated by the omission in I.C. § 49-916 of paragraph (7) of I.C. § 49-905, which makes failure to comply with the provisions of I.C. § 49-905 an infraction. Again, this shows the great difference in the statutes being interpreted in the *Evans* case and those specific provisions involved in the present matter. The holding in *Evans* is not applicable in this matter due to the differing statutes that apply. The District Court should not have relied on the holding in *Evans* in reaching his decision.

Based upon the plain meaning of the statutes that apply to Appellant's implement of husbandry, in order for Respondent to prove negligence per se under I.C. § 49-916 Respondent must provide evidence that Appellant caused or knowingly permitted Mr. Kukla to operate the tractor and hay baler on a roadway at night. The record is devoid of evidence that Appellant even knew that Mr. Kukla would operate the tractor and hay baler upon a roadway at night.

The tractor and baler were loaned to Mr. Kukla and transported from Appellate Robertson's property during the daytime, not after sunset. R, p. 258, Deposition of Darrell L. Robertson, p. 62, l. 21-p. 63, l. 11. Mr. Kukla advised Appellate Robertson only that he needed to use the tractor and baler to complete the baling of a field owned by the Schroll family. *Id.* at p. 39, ll. 7-17. Prior to the night of the accident, Appellate Robertson went to the Schroll family field and personally observed Mr. Kukla baling straw in the field. R, p. 233, ¶ 5. Mr. Kukla testified that it was his own decision to transport the tractor and baler on Highway 45 in order to fix a broken shear pin on the baler. R, p. 276, Deposition of Dustin M. Kukla, p. 132, ll. 1-23. According to Mr. Kukla, his tools were in his pickup at a different site on Highway 45 and he, "didn't't want to walk clear down there" in order to fix the baler. *Id.* Based on this record, Respondents have previously conceded that Appellate Robertson "may not have had actual knowledge of (Mr. Kukla's) likelihood of driving the tractor and baler at night without tail lights". R, p. 482, Memorandum in Opposition to Defendant Darrell Robertson's Motion For Summary Judgment, February 23, 2006, p. 10.

Based on the undisputed facts of this case as recognized even by Respondents, there is no evidence that Appellate Robertson caused or knowingly permitted Mr. Kukla to operate the tractor and baler on a public roadway at night. The evidence provided by Respondents simply shows that there was a possibility that the tractor and hay baler may have been operated on the

roadway at night. This evidence does not rise to the requirement of proving knowledge on behalf of Appellant that the tractor and hay baler would be operated on a roadway at night.

Appellant is not liable for the negligent acts of Mr. Kukla under Respondents' allegation of negligence *per se,* and is not independently liable under this theory because he did not cause or knowingly permit Mr. Kukla to move the tractor and baler on a pubic roadway during the times specified in I.C. § 49-903.

Appellant therefore requests that this Court reverse the District Court's decision and hold that Appellant is entitled to summary judgment on Respondents' claim of negligence per se.

4. Respondents Failed to Provide Sufficient Evidence to Establish the Elements of Negligent Entrustment.

Respondents allege that Appellate Robertson is liable under the theory of negligent entrustment. R, p. 35, ¶¶ 23-29. The application of the doctrine of negligent entrustment to the facts of this case is not justified based on the analysis of the establishment and development of the necessary elements of negligent entrustment under Idaho law. The tort of negligent entrustment was first recognized in Idaho in *Kinney v. Smith*, 95 Idaho 328, 508 P.2d 1234 (1973). In *Kinney*, Plaintiffs alleged that the owner of a motor vehicle was directly negligent for knowingly permitting an unlicensed driver to operate the vehicle. *Id.* at 329, 508 P.2d at 1235. The Supreme Court of Idaho held that owner of the vehicle could be held liable beyond the limits of Idaho Code § 49-1404, then Idaho's imputed liability statute, if the evidence established that the defendant furnished the "vehicle to an incompetent driver". *Id.* In a footnote, the Court then adopted the tort of negligent entrustment by stating:

> "If, on remand, the plaintiffs should desire to pursue the issue of negligent entrustment to an intoxicated driver, the district court should allow the amendment of the complaint *nunc pro tunc* to specifically set forth this conduct.

Id. Thus, under Idaho law, the tort of negligent entrustment as first adopted required that Plaintiff establish that the defendant furnished the vehicle to an incompetent or otherwise incapacitated driver.

In *Alegria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980), the Supreme Court of Idaho was asked to determine whether the sale of alcoholic beverages to "an actually, apparently and obviously intoxicated person known to be minor" could establish liability against the vendor for the subsequent negligent operation of an automobile by the minor. *Id.* at 618, 619 P.2d at 136. In its analysis of this issue, the court wrote:

> Subsequent to *Meade*, this Court in *Kinney v. Smith*, 95 Idaho 328, 408 P.2d 1234 (1973), held that a car owner who lends his vehicle to an unlicensed driver may be liable not only on a theory of imputed negligence, but also on the basis of the owner's independent negligence in entrusting the automobile to the unauthorized driver. In a footnote, we indicated that negligent entrustment of an automobile to one who is intoxicated would also be actionable. *Kinney v. Smith*, 95 Idaho at 331, 508 P.2d at 1237, at n. 1.
>
> The "negligent entrustment" tort approved in *Kinney* is recognition of the risk of injury which exists when two ingredients are combined; the automobile and an incompetent or incapacitated driver. In *Kinney*, we said that a party may be liable for providing an intoxicated individual with an automobile. The issue in this case is the converse, i.e., should a party ever be held liable for providing the driver of an automobile with intoxicants.

Id. at 620, 619 P.2d at 138 (Emphasis Added).

Under the Idaho Supreme Court's decision in *Alegria*, the tort of negligent entrustment as recognized in Idaho again required that Plaintiff establish the entrustment of an instrumentality to either an incompetent or incapacitated driver. As the court stated in *Alegria*, the adoption of the tort of negligent entrustment in Idaho was predicated upon the existence of two factors: a vehicle and an incompetent or incapacitated driver. The element of an incompetent or incapacitated driver served as one of the two defining elements of the tort of negligent entrustment from its earliest stages in Idaho.

The next important Idaho case addressing the doctrine of negligent entrustment after *Kinney* and *Alegria* was *Ransom v. City of Garden City*, 113 Idaho 202, 743 P.2d 70 (1987). In *Ransom*, a Garden City police officer gave the keys of a vehicle to a passenger that the officer knew was intoxicated after he arrested the vehicle's driver. After relying upon its previous analysis in the *Kinney* and *Alegria* cases, the Supreme Court of Idaho cited the following definition of the tort of negligent entrustment from the RESTATEMENT (SECOND) OF TORTS, § 308 (1965) in *Ransom*:

> "Permitting Improper Persons to Use Things or Engage in Activities.
>
> "It is negligence to permit a third person to use a thing or engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others."

In *Ransom*, the Supreme Court in citing to the restatement references Comment B to § 308, which further defines the meaning of an incompetent or incapacitated driver as adopted in *Kinney* and *Alegria*:

> The comments explain that the rule is most frequently applied "where the person is a member of a class which is notoriously likely to misuse the thing which the actor permits him to use." RESTATEMENT (SECOND) OF TORTS § 308 comment b (1965). The rule may also apply "if the third person's known character or the peculiar circumstances of the case are such as to give the actor good reason to believe that the third person may misuse it." *Id. See also*, RESTATEMENT (SECOND) OF TORTS § 308 illustration 2 (1965) ("A lends his car to B, whom he knows to be intoxicated. B's intoxicated condition leads him to cause harm to C. A is negligent toward C.").
>
> The most common factual scenarios to which the negligent entrustment rule is applied are those where a loaded firearm is entrusted to a minor or where an automobile is entrusted to an obviously intoxicated person.

113 Idaho at 206-7, 743 P.2d at 74-5.

The District Court in its decision recognized the elements of negligent entrustment as they apply generally in the United States by citing 57A AM. JUR. 2D *Negligence* § 318 (2004) as follows:

In an action based on the theory of negligent entrustment, the plaintiff must prove that:

(1) the entrustee was incompetent, unfit, inexperienced, or reckless;

(2) the entrustor knew (in some jurisdictions "actually" knew), should have known, or had reason to know of the entrustee's condition of proclivities;

(3) there was an entrustment of the dangerous instrumentality;

(4) the entrustment created an appreciable risk of harm to others; and

(5) the harm to the injury victim was "proximately" or "legally" caused by the negligence of the entrustor and the entrustee.

R, p. 432.

In recognizing these elements, it the District Court seems to have agreed that two of the necessary elements for a claim of negligent entrustment are an incompetent driver and prior knowledge by the owner of the borrower's incompetence.

Based on review of the *Kinney*, *Alegria* and *Ransom,* the necessity of proving that the vehicle or instrument was entrusted to an incompetent or incapacitated driver is fundamental to establishing a claim for negligent entrustment under Idaho law. It appears that Idaho Case law essentially recognizes the same elements as stated in 57A AM. JUR. 2D *Negligence* § 318 (2004).

A brief review of Idaho case law shows a consistent requirement that plaintiffs prove that the vehicle or instrument was entrusted to an incompetent or incapacitated driver in order to establish a claim for negligent entrustment. Each of the reported cases involving allegations of negligent entrustment following *Ransom*, the individuals entrusted with the vehicles were either intoxicated or unauthorized by law to operate the vehicles, and the person entrusting them with the vehicles was aware of these facts. *See Lopez v. Langer*, 114 Idaho 873, 761 P.2d 1225 (1988) (nineteen-year-old driver had a lengthy record of traffic violations and convictions,

including driving under the influence), *Olguin v. City of Burley*, 119 Idaho 721, 810 P.2d 255 (1991) (police officers released vehicle to intoxicated driver after advising him not to drive), and *Fuller v. Studer*, 122 Idaho 251, 833 P.2d 109 (1992) (defendant allegedly entrusted three-year-old toddler with snowmobile).

In this case, it is not contested that Appellate Robertson permitted Mr. Kukla to operate the tractor and baler in order to bale straw on private property. Respondents, however, have failed to provide sufficient evidence that Appellant knew or should have known that Mr. Kukla was an incompetent, unfit or reckless operator at the time the hay baler was entrusted to Mr. Kukla. At the time of the entrustment, Appellant was advised by Mr. Kukla that the tractor and baler would be used for the purpose of baling straw on private property owned by the Schroll family. R, p. 253, Deposition of Darrel L. Robertson, p. 41, l. 4-p. 47, l. 17. When Appellate Robertson loaned the tractor and baler to Mr. Kukla it was daytime, not nighttime. *Id.* Prior to allowing Mr. Kukla to borrow the tractor and baler, Appellate Robertson made sure that Mr. Kukla knew how to properly operate the tractor and baler for its intended use by having him complete a portion of the field that Appellate Robertson had been baling. R, p. 233, ¶ 4. Appellate Robertson had previously loaned Mr. Kukla a flail chopper which had been returned without incident. R, p. 247, Deposition of Darrell L. Robertson, p. 16, l. 18-p. 17, l. 3, p. 22, l. 22-p. 23, l. 17. Thus, at the time of the entrustment of the tractor and baler to Mr. Kukla, Appellate Robertson's previous experience with loaning equipment to Mr. Kukla had been positive. The evidence suggests that Appellant's knowledge of Mr. Kukla at the time of entrustment was that he was a competent, responsible operator of farm equipment.

In the face of this evidence, Respondents attempt to rely on vague and speculative evidence to support their assertions. Respondents allege that the mere fact that the lighting equipment on the hay baler did not work coupled with a nonspecific understanding that some farmers bale hay at night

shows that Appellant knew or should have known that Mr. Kukla was an incompetent or reckless driver. R, p. 482, Memorandum in Opposition to Defendant Darrell Robertson's Motion For Summary Judgment, February 23, 2006, p. 10. This evidence is too speculative to create a jury question regarding whether Appellant knew or should have known Mr. Kukla was an incompetent or reckless operator. The jury would have to impermissibly guess at too many issues. *See Antler v. Cox*, 27 Idaho 517, 519, 149 P.731, 733 (1915).

The District Court apparently sensing the lack of evidence to support a negligent entrustment action, attempted to surmise what type of evidence may support a claim of negligent entrustment. "They [the jury] could very well base their decision upon expert testimony that in Canyon County, at least, one expects farmers and ranchers to drive balers on highways at night. The "expert" testimony could be nothing more than a series of farmers and ranchers testifying about common practices among their fellow ranchers and farmers, all of which they have personal familiarity." R, p. 435. Strangely, none of the evidence that the District Court suggests may be adequate was presented by Respondent in support of denying the motion for summary judgment. It seems the District Court's decision was impermissibly based upon evidence that was not part of the record.

When analyzing the actual elements of negligent entrustment and the actual evidence before the District Court on summary judgment, Respondents' negligent entrustment claims fails as a matter of law. There is no evidence in this case that Appellate Robertson was aware, or had reason to be aware, that Mr. Kukla intended or was likely to use the tractor and baler in such a manner to create an unreasonable risk of harm to others. Appellate Robertson had no reason to believe that Mr. Kukla was a person who was a member of a class which was notoriously likely to misuse the tractor and baler. Mr. Kukla's known character and the peculiar circumstances of the case were not such that Appellate Robertson had reason to believe that Mr. Kukla would

misuse the tractor and baler. Unlike the negligent entrustment cases cited, there is no evidence that Appellate Robertson was aware or should have been aware that Mr. Kukla was an incompetent or incapacitated driver at the time of the entrustment, and that Mr. Kukla would violate Idaho law by operating the tractor and baler on a public roadway after sunset. In this case, Appellate Robertson was entitled to rely on his understanding that the tractor and baler would be used only for the purpose of baling straw on property owned by the Schrolls because he had no actual or implied knowledge that Mr. Kukla would do otherwise.

Appellant therefore requests that this Court reverse the District Court's ruling and grant Appellant's motion for summary judgment on the claim of negligent entrustment.

B) The Jury's Verdict that Appellate Robertson's Actions were not a Proximate Cause of the Respondents' Injuries Should be Upheld?

1. Standard of Review

Pursuant to I.R.C.P. 59(a):

A new trial may be granted to all or any of the parties and on all or part of the issues in an action for any of the following reasons:

1. Irregularity in the proceedings of the court, jury or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.

2. Misconduct of the jury.

3. Accident or surprise, which ordinary prudence could not have guarded against.

4. Newly discovered evidence, material for the party making the application, which the party could not, with reasonable diligence, have discovered and produced at the trial.

5. Excessive damages or inadequate damages, appearing to have been given under the influence of passion or prejudice.

6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against the law.

When faced with arguably inconsistent special jury verdicts, the trial court "must look at the evidence and the instructions given and see if there is a view of the case that makes the jury's answer consistent. If there is this consistent view, the court must resolve the case in that way." *Cook v. State, Dept. of Transp.* 133 Idaho 288, 985 P.2d 1150, (Idaho 1999), *Griffith v. Latham Motors, Inc.,* 128 Idaho 356, 360, 913 P.2d 572, 576 (1996).

2. The Jury's Verdict Should be Read to be Consistent.

The jury consistently found that the actions of Darrell Robertson were not a proximate cause of Respondent's damages. The special verdict form instructed the jury that if they answered yes to the questions regarding proximate cause as to any of the claims for any of the parties, then they were to proceed to Question 10 pertaining to fault. Question 10 then instructed the jury to apportion fault. The jury is then advised that the sum must equal 100%.

Respondent asserts that remedy for the alleged inconsistency in the Special Verdict form can be found in I. R.C.P. 49(b). Pursuant to I. R.C.P. 49(b):

> The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

When faced with arguably inconsistent special jury verdicts, the trial court "must look at the evidence and the instructions given and see if there is a view of the case that makes the jury's answer consistent. If there is this consistent view, the court must resolve the case in that way."

Cook v. State, Dept. of Transp. 133 Idaho 288, 985 P.2d 1150, (Idaho 1999), *Griffith v. Latham Motors, Inc.,* 128 Idaho 356, 360, 913 P.2d 572, 576 (1996).

In the present case, it is clear that the jury did not intend to find that the actions of Appellate Robertson were the proximate cause of Respondent's damages. Each time the question was asked with respect to proximate cause as to Appellate Robertson, the jury answered "No." If an inconsistency were found by the Court between the interrogatory answers and the verdict, Appellate Robertson would ask that the Court direct the entry of judgment in accordance with the answers, and not grant a new trial in this matter.

The verdict is also consistent with the evidence.

Pursuant to I.R.C.P. 59(a):

> A new trial may be granted to all or any of the parties and on all or part of the issues in an action for any of the following reasons:
> ...
> 6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against the law.

In order to grant a new trial pursuant to I.R.C.P. 59(a)(6) on the ground of insufficiency of the evidence to justify the verdict or other decision, or that it is against the law, the trial court must determine both (1) the jury verdict is against the clear weight of the evidence, and (2) a new trial would produce a different result. *City of McCall v. Seubert*, 142 Idaho 580, 130 P.3d 1118, (Idaho 2006); *Heitz v. Carroll*, 117 Idaho 373, 788 P.2d 188 (1990).

Appellate Robertson would assert that a new trial would not present a substantively different result. There is no evidence that the amount of the damages would be different. Furthermore, there is no indication that a new trial would result in the determination that Appellate Robertson was the proximate cause of Respondents' damages. In the present case, Respondents did not meet the burden of proof against Appellate Robertson. The jury clearly and unequivocally determined that the actions of Appellate Robertson were not the proximate cause of Respondents' damages. Respondents are not entitled to a new trial.

Respondents argued that the verdict is against the law as it allegedly violates the legal principles of negligence. Respondents have assumed, however, that by apportioning "fault" that the jury was indicating that Appellant was negligent and that negligence was the proximate cause of Respondents' damages. Respondents' assumption is faulty. The jurors repeatedly determined that the actions of Appellant were not a proximate cause of Respondents' injuries. The jurors apportioned fault as they were instructed to do in the special verdict form. There is no reason to believe that by answering Question 10 of the Special Verdict Form, that the jurors was making any determination with respect to negligence. In fact, the word "fault" is not used in the instructions for negligence and proximate cause.

INSTRUCTION NO. 10

> When I use the word "negligence" in these instructions, I mean the failure to use ordinary care in the management of one's property or person. The words "ordinary care" mean the care a reasonable careful person would use under circumstances similar to those shown by the evidence. Negligence may thus consist of the failure to do something which a reasonably careful person would do, or the doing of something a reasonably careful person would not do, under circumstances similar to those shown by the evidence.

INSTRUCTION NO. 12

> When I use the expression "proximate cause", I mean a cause that, in natural or probable sequence, produced the injury, the loss or the damage complained of. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage.
> There may be one or more proximate causes of an injury. When the negligent conduct of two or more persons or entities contributes concurrently as substantial factors in bringing about an injury, the conduct of each may be a proximate cause of the injury regardless of the extent to which each contributes to the injury.

Based on the language used in the Final Instructions, Negligence without proximate cause does not translate into fault. A jury verdict which does not violate Idaho law should not be cast aside so lightly. Such a result would undermine the principle of the finality of trials. If at all possible, the jury's verdict should be upheld.

Appellant therefore requests that this Court find that the jury's verdict was not inconsistent and reverse the District Court's decision granting Respondent's motion for new trial.

IV. CONCLUSION

Based upon the facts presented and the record on appeal, this Court should reverse the District Court's rulings on (1) Appellant's motion for summary judgment and (2) Respondents' motion for new trial.

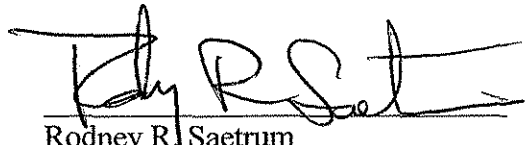
The District Court misinterpreted case law and statutes in finding that owners of implements of husbandry are subject to imputed liability under I.C. § 49-2417. The District Court failed to properly analyze I.C. §§ 49-902(1) and (3); 49-903 and 49-916, in finding that implements of husbandry are required to have the lighting requirements of I.C. § 49-916 at all times. The District Court inappropriately relied upon evidence that was not in the record in finding that sufficient evidence existed for Respondents' negligent entrustment claim. This Court should therefore reverse the District Court's rulings on these matters.

The jury's verdict could be interpreted to be consistent in the specific interrogatories. The District Court improperly cast aside the jury's findings and granted a new trial. This Court should reverse the District Court's order granting a new trial.

Appellant also requests that it be reimbursed its costs on appeal.

Respectfully submitted this 19th day of November 2008.

SAETRUM LAW OFFICES

By 

Rodney R. Saetrum
Attorneys for Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of November 2009, I caused a true and correct copy of the foregoing document to be served by the method indicated below and addressed to:

Eric S. Rossman
Erica S. Phillips
ROSSMAN LAW GROUP, PLLC
737 N. 7th Street
Boise, ID 83702

_____ U.S. Mail
_____ ✓ Hand Delivery
_____ Overnight Mail
_____ Facsimile

Rodney R. Saetrum